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No. 06-493

FILED

NOV 28 2006

OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

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QUICKEN LOANS INC.,

*Petitioner,*

v.

PRESTON DUFAUCHARD,

*Respondent.*

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**On Petition for a Writ of *Certiorari* to the United States Court of Appeals for the Ninth Circuit**

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# REPLY IN SUPPORT OF PETITION FOR A WRIT OF *CERTIORARI*

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November 28, 2006

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## I. The Ninth Circuit has split with the Seventh Circuit on the scope of the Parity Act's express preemption.

### A. The Ninth Circuit's three-part test for Parity Act preemption conflicts with the holding of the Seventh Circuit.

The Seventh Circuit "h[e]ld that the new state regulations [at issue there] are preempted under § 3803(c) to the extent that they block state lenders from extending credit on terms open under federal regulations, when the lenders actually comply with the federal regulations." Ill. Ass'n of Mortg. Brokers v. Office of Banks and Real Estate, 308 F.3d 762, 768 (7th Cir. 2002) ("IAMB"). The Commissioner does not (and cannot) claim that the Ninth Circuit's three-part test, which compels a disparate outcome, is consistent with the Seventh Circuit's.

### B. The split is over the scope of express preemption, not conflict preemption.

The issue that divides the circuits is the scope of the Parity Act's express preemption, not conflict preemption. That is, the issue is whether Quicken Loans *must* comply with the Per Diem Statutes when making alternative mortgage transactions even though federally chartered lenders need not. The issue is *not*, as the Commissioner implies (Brief in Opposition at 3), the scope of conflict preemption. Whether Quicken Loans is able to comply with both the Per Diem Statutes and federal regulations of alternative mortgage transactions is irrelevant to the question of whether the Per Diem Statutes are preempted for the purpose of creating parity, because federally chartered lenders are indisputably not subject to the same state regulations.

Contrary to the Ninth Circuit's holding, Quicken Loans need not comply with the Per Diem Statutes when

making alternative mortgage transactions, because the Parity Act explicitly preempts the statutes. Otherwise there is disparity, in that state-chartered lenders are at a disadvantage compared to federally chartered lenders. The Seventh Circuit's and Fourth Circuit's proper interpretation of the Parity Act creates parity; the Ninth's creates disparity. The Ninth Circuit's decision not only disregards the text of the law, but defeats the statutory purpose, which is to eliminate the commercial advantage that federally chartered lenders used to enjoy over non-federally chartered lenders. The Commissioner's Brief fails to address this.

This Court should grant *certiorari* to address the conflict among the circuits on the scope of the Parity Act's express preemption.

## II. Which regulations that OTS deems appropriate and applicable to state chartered lenders does not determine whether the Parity Act preempts the Per Diem Statutes.

The Commissioner argues that the Parity Act does not preempt the Per Diem Statutes as applied to Quicken Loans' alternative mortgage transactions because none of the four regulations that OTS identified as appropriate and applicable to state housing creditors address per diem interest. (Brief in Opposition at 7). However, what federal regulations OTS deems appropriate and applicable to nonfederally chartered lenders who want to enjoy the benefit of the statute is only half the picture and is not even pertinent to the issue in this case. The pertinent half of the picture, which the Commissioner does not address, is what *state* regulations are *not* applicable to alternative mortgage transactions made by federally chartered lenders. Whatever those state regulations are, they are preempted as to state-chartered lenders, because they do not equally apply to federally chartered lenders.

It is undisputed that the Per Diem Statutes do not apply to alternative mortgage transactions made by federally chartered lenders. Further, the Parity Act provides that "[a]n alternative mortgage transaction may be made by a housing creditor in accordance with this section, notwithstanding any State constitution, law, or regulation." 12 U.S.C. Section 3803(c). Given these two facts, neither the Ninth Circuit nor the Commissioner has adequately explained why the Parity Act does not preempt the Per Diem Statutes as applied to Quicken Loans' alternative mortgage transactions.

## III. The Ninth Circuit erred in refusing to defer to the OTS' opinion letter because the Maryland statute is essentially identical to the Per Diem Statutes.

The Ninth Circuit should have deferred to the OTS' interpretation of DIDMCA as stated in OTS' opinion letter regarding DIDMCA's preemption of Md. Comm. Law Section 12-103. There is no meaningful difference between the Maryland statute's prohibiting interest "in advance" of a certain event and the Per Diem Statutes' prohibiting interest "before" a certain event. Each means "prior to" or "before the occurrence of" some event. Therefore, the Ninth Circuit should have deferred to OTS' opinion.

The Commissioner's insistence that the Per Diem Statutes address only *when* interest may be charged, but not *what amount or rate* of interest may be charged, ignores the fact that there is never a "when" without a "what." The issue is how much interest may be charged at a particular point in time. The answer under the Per Diem Statutes is: for a varying and unknowable period—until the county recorder stamps the underlying mortgage—no amount of interest may be charged. This results in an interest rate of zero percent for the period and reduces the loan's overall interest rate.

This Court should grant *certiorari* to correct the Ninth Circuit's failure to defer to administrative

interpretations which that Court finds "unpersuasive" and to which it therefore declines to defer. The Ninth Circuit has erroneously conflated "deference" with "agreement."

## CONCLUSION

The Ninth Circuit's erroneous interpretations of the Parity Act and DIDMCA will lead to further erosion of the preemption of state regulation of mortgage financing, contrary to Congress' explicitly-stated intent. This Court should act now to correct the Ninth Circuit's incursion upon Congress' power to regulate this important national industry. For the foregoing reasons, the Petition should be granted, and the decision below summarily reversed, or the case should be set for plenary briefing and argument on the questions presented.

Respectfully submitted,

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